No. 15804

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WARREN A. OTT and MORTGAGE SERVICES OF NORFOLK, INC., a corporation,

Appellants,

vs.

HOME SAVINGS AND LOAN ASSOCIATION, a corporation,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES PAGE

RULES AND REGULATIONS

STATUTES

TEXTBOOKS PAGE

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APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

This appeal is from a judgment of dismissal [R.[1] 19-21] entered in the United States District Court for the Southern District of California, Central Division, dismissing Appellants' First Amended Complaint.

Paragraphs I, II and III of Appellants' First Amended Complaint allege diversity of citizenship and an amount in controversy of over Three Thousand Dollars [R. 8-9]. The District Court had jurisdiction under Section 1332 of Title 28 of the United States Code.

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[1]"R" is used herein to refer to the pages of the printed Transcript of Record.

The District Court granted Appellee's motion to dismiss Appellants' First Amended Complaint on the grounds that it failed to state a claim upon which relief could be granted and failed to join an indispensable party [R. 18-19]. Thereupon, judgment of dismissal was entered and filed on November 6, 1957 [R. 19-21]. Notice of appeal was filed on November 12, 1957 [R. 21-22]. This Court has jurisdiction under Section 1291 of Title 28 of the United States Code.

II.

Concise Statement of Facts.

Appellants Warren A. Ott and Mortgage Services of Norfolk, Inc. brought an action for damages for alleged breach of contract against Appellee Home Savings and Loan Association [Amended Complaint, R. 8-13]. Appellee filed a motion to dismiss the Amended Complaint for failure to state a claim upon which relief could be granted and for failure to join an indispensable party [R. 18], in that the alleged contract was between Appellee and one Shaw or his "nominee", that such contract was not assignable, but Appellants were suing as assignees and not as nominees, and that an indispensable party, Shaw, was lacking.

The alleged contract is in the form of a letter, the material terms of which are [Par. VI, and Ex. A, Amended Complaint, R. 10, 13-14]:

"December 31, 1953

Mr. Harold L. Shaw
650 South Spring Street
Los Angeles 14, California

Dear Mr. Shaw:

This letter is to serve as a binding commitment, for a period of three years from date hereof, upon Home Savings and Loan Association to make to you or your nominee the following loans:

. . . . . .

(2) In addition to the above, Home agrees to purchase from you or your nominee up to Seven and One Half Million Dollars ($7,500,000) of permanent real estate loans to be guaranteed under the provisions of the Servicemen's Readjustment Act of 1944, as amended. Said loans shall have a maturity date of Twenty-nine years. The purchase price of said loans to be at par less Seven and One Half Per Cent (7½%) thereof.

Yours very truly,
HOME SAVINGS AND LOAN ASSOCIATION
S/ Howard F. Ahmanson
President"

Appellants Ott and Mortgage Services of Norfolk, Inc. allege that their rights in such alleged written agreement arise out of a paper which reads [Par. VII, and Ex. B, Amended Complaint, R. 10-11, 15]:

"DESIGNATION OF NOMINEE AND ASSIGNMENT OF COMMITMENT

FOR AND IN CONSIDERATION of Ten ($10.00) Dollars and other good and valuable consideration, I, the undersigned HAROLD L. SHAW, herewith designate and appoint MORTGAGE SERVICES OF NORFOLK,

Inc., and Warren A. Ott, of Norfolk, Virginia, as my Nominee under that certain commitment executed December 31, 1953, by Home Savings and Loan Association, by Howard Ahmanson, President, to the undersigned, a copy of which said loan commitment is attached hereto.

I, the undersigned Harold L. Shaw, herewith assign, set over and transfer unto Mortgage Services of Norfolk, Inc., and Warren A. Ott, as my nominee, all of my right, title and interest in and to the aforesaid commitment and all of my rights thereunder.

Dated: 10th day of November, 1956.

s/ Harold L. Shaw

Foregoing assignment is accepted:

Dated: November 15, 1956

Mortgage Services of Norfolk, Inc.

By s/ Warren A. Ott,
President
Warren A. Ott"

Appellants further allege that as a result of such paper they "are the owners and holders of all the right, title and interest of the said Harold L. Shaw in and to the agreement in writing. . . ." [Par. VII, R. 11], and that Appellee was notified thereof on December 5, 1956 [Par. VIII, R. 11].

The Amended Complaint contains no allegations of a tender of loans by Shaw, or by Appellants on behalf of Shaw or as nominees of Shaw. It does allege that "the Plaintiffs tendered to the Defendant and offered to sell and deliver to the Defendant" certain loans [Par. X, R. 11].

Appellants also rely upon a letter of December 20, 1956 [Par. X and Ex. C, Amended Complaint, R. 12, 16-17], which reads in part:

"MORTGAGE SERVICES of Norfolk, Inc. Granby at Olney Road, Norfolk 10, Virginia

December 20, 1956

Home Savings & Loan Association
9245 Wilshire Boulevard
Beverly Hills, California

Attention: Mr. Kenneth D. Childs

Gentlemen:

This will serve to advise you that Mortgage Services of Norfolk, Inc., and Warren A. Ott of Norfolk, Virginia, have been designated as nominee by Mr. Harold L. Shaw under the commitment dated December 31, 1953, executed by Home Savings & Loan Association to Mr. Harold L. Shaw, and we are pleased to advise you that we hold an assignment from Mr. Shaw of all of his rights as his nominee under the the aforesaid commitment of Home Savings & Loan Association.

We herewith accept the offer and commitment of Home Savings & Loan Association. . . .

. . . we are pleased to formally tender to you $7,500,000 worth of permanent real estate loans . . .

We are ready, able and willing to make immediate delivery . . .

. . . . . .

Very truly yours,
MORTGAGE SERVICES
of Norfolk, Inc.
By s/ Warren A. Ott
President
s/ Warren A. Ott"

Shaw is not a party to the Amended Complaint, nor do Appellants anywhere allege they were acting in his behalf, or are now suing in his behalf.

The Amended Complaint was filed by Appellants with leave of court granted at a hearing on motions for summary judgment addressed to the original Complaint [R. 7-8]. The Amended Complaint, in addition to other matters not appearing in the original Complaint, for the first time alleged in general terms that Appellee dealt with Appellants as assignees, and that Appellants changed their position in reliance thereon [Par. IX of Amended Complaint, R. 11].

III.
Summary of Argument.

Under the parol evidence rule, evidence cannot be introduced to vary the terms of a written agreement. The alleged written agreement on which Appellants sue was to purchase loans from "you [Harold L. Shaw] or your nominee". A nominee is a person acting for or standing in the place of the owner, and a nominee has no claim of ownership in his own right. By contrast, an assignee has an interest in his own right as owner. The status of nominee is inconsistent with that of holder of all right, title, and interest, or that of assignee. The use of the word "nominee", particularly in the absence of any provision for assignment, makes the contract non-assignable, and evidence cannot be introduced to vary the express language. The Amended Complaint is defective in the following respects, each of which is fatal:

1. Appellee's offer to buy ran until December 31, 1956. No tender by Shaw of any loans whatever is alleged, nor by Appellants for Shaw. The tenders alleged are by Appellants on their own behalf and in their own interest. Hence, Shaw or his "nominee" has never acted under the contract, and the offer has lapsed.

2. Appellants nowhere allege they are suing for Shaw or on his behalf. On the contrary, the Amended Complaint as a whole makes it clear Appellants are not suing as nominees but as owners by assignment. As such, they have no rights under the contract.

3. If it can be argued that Appellants are suing as nominees, they are not the real party in interest. The principal, not the nominee, is the real party in interest. The real party in interest, Shaw, is not made a party, although he is an indispensable party.

Appellants concede that if there can be no assignment and they are mere nominees, Shaw is a necessary party (A. B.[2] 7, 13).

Finally, the allegations of the Amended Complaint that there was a waiver of non-assignability are vague and unsupported by specific facts, and are contradicted by the specific facts alleged in the Complaint.

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[2]"A. B." is used herein to refer to the pages of Appellants' printed Opening Brief.

IV.

A "Nominee" Is One Who Acts for Another, and Is Not an Assignee.

A "nominee" is one designated to act for another, in the right of the other in a limited sense.

The word "nominee" has a limited meaning, and a *nominee* has no rights in or to his principal's contract.

Cisco v. Van Lew, 60 Cal. App. 2d 575, 141 P. 2d 433 (1943);

Schuh Trading Company v. C. I. R., 95 F. 2d 404 (7th Cir., 1938);

B. F. Avery & Sons Co. v. Glenn, 16 Fed. Supp. 544 (W. D. Ky. 1936);

28A *Words and Phrases,* 316, 317.

In *Cisco v. Van Lew, supra,* defendant listed real property with McGuire for sale. McGuire received an offer of $2,000 from Cisco, and of a higher price from Cohn. McGuire did not tell defendant of the Cohn offer, and persuaded defendant to open an escrow with McGuire for $2,000, title to vest in J. H. McGuire, "or his nominee", because McGuire could not remember the purchaser's name. McGuire later filed a paper in the escrow stating that title was to be vested in Cisco. Defendant later heard of the Cohn offer and rescinded. Cisco and McGuire brought suit for specific performance and commissions.

The Court denied relief on the grounds that Cisco, not having been named in the document signed by defendant, could not get specific performance, and that if Cisco was

suing as nominee he stood in the position of McGuire and was barred by unclean hands. The Court said (60 Cal. App. 2d 583-584):

> "There appears to be no uncertainty or ambiguity as to the sense in which the words 'his nominee' are used. They mean simply that title is to be 'shown' as vested either in McGuire himself or such person or persons as McGuire should designate to receive title in his behalf . . . The word 'nominee' in its commonly accepted meaning, connotes the delegation of authority to the nominee in a representative or nominal capacity only, and does not connote the transfer or assignment to the nominee of any property in or ownership of the rights of the person nominating him.
>
> . . . . . .
>
> ". . . In the absence of an assignment from McGuire to the Ciscos or some other effective substitution of the Ciscos for McGuire as the purchasers, no rights become vested in the Ciscos which they are entitled to assert on their own behalf independently of McGuire. At best, they are but nominal parties seeking to enforce some right or rights of McGuire and not their own, and therefore the Ciscos have failed to establish any right or interest in the subject matter of the action which they, as mere nominees of McGuire, are entitled to have specifically enforced."

The Court relied upon *Schuh Trading Company v. C. I. R.*, 95 F. 2d 404 (7th Cir., 1938). The Commissioner there contended there was no reorganization under the tax laws on the grounds that McKesson & Robbins was not a party to the transaction because assets that by contract were to go to McKesson & Robbins "or its

nominee" went to a fully owned subsidiary as nominee. In denying this contention, the Court said (95 F. 2d 411):

> ". . . The word nominee ordinarily indicates one designated to act for another as his representative in a rather limited sense. It is used sometimes to signify an agent or trustee. It has no connotation, however, other than that of acting for another, in representation of another, or as the grantee of another . . . The mere fact that McKesson & Robbins, the active party to the contract of reorganization, directed that the assets should be transferred to its nominee instead of directly to itself in nowise detracts from the fact that McKesson & Robbins contracted to receive and did in fact receive through its nominee that which it contracted for."

In *B. F. Avery & Sons Co. v. Glenn,* 16 Fed. Supp. 544 (W. D. Ky. 1936), in a question of whether stamp taxes were due on a transfer of stock to a trustee under a voting trust, the Court distinguished a cited case involving a transfer to a nominee, saying (16 Fed. Supp. 547-8):

> "There is a substantial difference between a nominee and a trustee. A nominee is synonymous with an agent to receive property in futuro and one who represents and acts for his principal, and the principal is bound by what he does in discharge of the agency. A trustee is not an agent, but a person in whom some estate, interest, or a power in or affecting property is vested for the benefit of another."

So well established is the meaning of "nominee" that cases assume it without discussion. Thus, when Mr. Justice Brandeis, in *Founders General Co. v. Hoey,* 300 U. S. 268, 273, 57 S. Ct. 457, 81 L. Ed. 639 (1937), in discussing the three cases before him, said:

> "In each case, the person originally entitled to receive the certificate directed, for his own convenience

> and purposes, that it be issued in the name of a nominee."

he was referring to cases in which stock was issued at the bequest of the owner in the name of someone with no beneficial interest or claim of beneficial interest, but merely for convenience of the owner (see Discussion of Facts, 300 U. S. 270-272). In one of the lower court opinions, Judge Augustus M. Hand used "nominee" repeatedly to describe the partnership whose sole business was to hold bare legal title to securities for the owner, and which by express contract had no beneficial interest in such securities, and stated that the question was whether the mere nomination of such partnership "as a dummy" was taxable.

> *Founders General Corporation v. Hoey,* 84 F. 2d 976, 977-979 (2nd Cir., 1936).

In *United States v. A. B. Leach & Co.,* 84 F. 2d 908 (7th Cir., 1936), the Seventh Circuit Court described without discussion as "nominee" an employee of a firm of stock brokers in whose name the firm had stock issued for convenience in contemplated sales to the public. The use of the word "nominee" in these cases demonstrates its common and clear usage and meaning.

How restricted a meaning the word "nominee" has in actual practice is shown in the discussion of the word by the Deputy Commissioner of Internal Revenue (Letter 1/10/39 from D. S. Bliss, Deputy Commissioner, P-H Federal Taxes, Permanent Volume, Excise Taxes, Par. 190,307):

> "Reference is made to your letter of December 5, 1938, relating to the distinction between a nominee and a custodian, particularly as the latter term is used

in section 711 of the Revenue Act of 1938 and the regulations relating thereto.

"In reply you are advised that it is the view of this office that the word 'custodian', as used in section 711, signifies a person who has independent possession of securities. This is indicated in the statute by the words 'held or disposed of . . . for . . . the owner', as well as by the requirement of a written agreement between the owner and the custodian. It would appear to be inconsistent for the owner to execute a written agreement respecting the care of securities with a person who did not have independent possession of them. It should be noted, however, that the custodian in such a case is not a 'nominee'. It is not the usual function of a nominee to retain possession of the securities registered in his name. The nominee merely lends his name, and the securities endorsed by him, are held by the owner, or by the custodian. Ordinarily, a nominee is an employee of the owner or custodian, or may be a partnership created solely in order to lend its name for nominee purposes. The ordinary nominee is therefore not a custodian within the meaning of section 711."

"Nominee" has the same restricted meaning in lay circles. Harold McMillan, Prime Minister of England, when addressing a meeting of the Inter-Parliamentary Union in London recently, defined parliamentary government as a representation of "individuals, not ciphers; free men, not nominees."

The New Yorker, Vol. XXXIII, No. 32, Sept. 28, 1957, p. 136 (Letter from London).

Appellants argue that nominee and grantee are synonymous, and that grantee and assignee are synonymous, so that nominee and assignee are the same (A. B. 11). It is true that a nominee, to the extent he receives title, is a grantee, but grantee is a word of great range. A grantee may receive only a bare legal title with no beneficial interest (as a nominee) or full and complete ownership (as an assignee). He is a grantee in both cases because he is the recipient of a grant, but the grant he receives depends on the terms in which it is couched.

V.

The Contract Was Not Assignable.

An agreement is not assignable if by its terms it shows an intent by the offerer to deal only with the person to whom it is made.

Arkansas Valley Smelting Co. v. Belden Co., 127 U. S. 379, 8 S. Ct. 1308, 32 L. Ed. 246 (1888);

Portuguese-American Bank v. Welles, 242 U. S. 7, 37 S. Ct. 3, 61 L. Ed. 116 (1916);

Wheeling Creek Gas Coal & Coke Co. v. Elder, 170 Fed. 215, 221-2 (N. D. W. Va., 1909);

LaRue v. Groezinger, 84 Cal. 281, 24 Pac. 42 (1890);

Farmland Irrigation Co. v. Dopplmaier, 48 Cal. 2d 208, 222, 308 P. 2d 732 (1957).

In *Arkansas Valley Smelting Co. v. Belden Co., supra,* the United States Supreme Court said (127 U. S. 387):

> "But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have

> the right to the benefit you anticipate from the character, credit and substance of the party with whom you contract.' "

In *Portuguese-American Bank v. Welles, supra,* Mr. Justice Holmes said (242 U. S. 11):

> "There is a logical difficulty in putting another man into the relation of the covenantee to the covenantor, *because the facts that give rise to the obligation are true only of the covenantee*—a difficulty that has been met by the fiction of identity of person and in other ways not material here. *Of course a covenantor is not to be held beyond his undertaking and he may make that as narrow as he likes.*" (Italics added.)

In *LaRue v. Groezinger, supra,* the California Supreme Court stated that while the omission of the words "or assignee" from an option did not render the option non-assignable, nevertheless such an option would be non-assignable if (1) the circumstances under which it was made showed that it was not to be assigned, or if (2) the language used showed an intention on the part of the optionee that it was not to be assigned. As to the latter, the Court said (84 Cal. 283-4):

> "Upon the same principle, although a contract may not expressly say that it is not transferable, yet if there are equivalent expressions or *language which excludes the idea of performance by another, it is not assignable.*" (Italics added.)

That this was a personal, non-assignable obligation is shown in the language in which it was couched. It was in a letter addressed to Shaw, and ran to "you, or your nominee" [R. 14]. This personal tone, the omission of

the word assignee and the use of the severely restrictive word "nominee" in its stead, demonstrate that the alleged agreement was not assignable.

The word "nominee" as used in the contract must be given effect. In the case of *Wagner Electric Corp. v. Hydraulic Brake Company,* 12 Fed. Supp. 837 (S. D. Cal., 1935), Wagner contracted to render monthly reports to Hydraulic covering total sales by Wagner "of licensed equipment and parts thereof" and to accompany such reports with payment of royalties specified in the license agreement. Wagner claimed that "parts", when not covered by claims of Hydraulic's patents, were not subject to royalties. Judge McCormick said (12 Fed. Supp. 844):

> "Moreover, if the parties had intended that only patented entities were to be subjected to royalties, they would not have used the words 'and parts thereof'. It would have been sufficient to have used the expression 'licensed equipment'. It is an established principle that in construing writings effect should be given to each and all words used if that can be done reasonably."

Similarly, Section 1641 of the California Civil Code provides:

> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

The offer was an offer to purchase personal notes executed by unspecified individual veterans. These notes must name a specific payee and cannot be bearer notes (see 38 C. F. R. 36.4000(t)). Accordingly, an endorsement is necessary for their negotiation.

The alleged agreement is silent as to what type endorsement the notes were to carry. Even if the endorsement could be "without recourse", such a limited endorser does not rid himself of all liability. He is liable as a warrantor.

Cal. Civ. Code, Sec. 3146;

Quatman v. Superior Court, 64 Cal. App. 203, 208-209, 221 Pac. 666 (1923);

Spiegelman v. Eastman, 95 Cal. App. 205, 212-213, 272 Pac. 761 (1928);

Owens-Parks Lumber Co. v. McCarty, 121 Cal. App. 623, 629, 9 P. 2d 310 (1932).

In either event, whether the endorsement was to have been with or without recourse, the financial ability and personal integrity of the endorser are of paramount importance in an operation of this magnitude. And at least as important is confidence in the business judgment and personal integrity of the seller.

The essential factor in any loan is the credit standing and character of the borrower. Appellee quite obviously from the contract language intended to deal in such matters only with Shaw and not with a stranger.

That the loans are to be real estate loans merely narrows the risk. By the terms of the agreement, the loans must be twenty-nine year loans. Accordingly, valuation of the security involves not only a judgment as to the present value of the real estate securing each note, but a prognostication as to the long range value of that real estate.

Likewise, the requirement that the personal notes be guaranteed by the United States Government does not eliminate the necessity for shrewd judgment of the long

range credit of the veteran-maker, as well as of the real estate security. By law, the guarantee of the United States Government on a veteran's real estate loan is limited to 60 per cent of its value or $7,500, whichever is smaller. 64 Statute 75, Section 301(d); 38 U. S. C. 694a(b). The maximum amount of guarantee possible on $7,500,000 worth of veterans' loans under the statutory formula would be $4,500,000, which would leave at least $3,000,000 unguaranteed, or a larger sum if any loans exceeded $7,500, or were guaranteed before 1950 when the maximum guarantee was smaller.

Necessarily, Appellee, in making the offer, was relying on the personal integrity of Shaw and his judgment both of real estate values and of the financial responsibility of the individual veteran borrowers. Such personal reliance is not an article to be sold and assigned without the consent of the person relying.

It is important to note also that the original letter, Exhibit A, covered both the making and the buying of loans [R. 13-14]. The restrictive word "nominee" is also used as to the making of loans, and the reasons for dealing with a known individual are for obvious reasons even more cogent in these circumstances.

Further proof of the need of the restriction imposed by "nominee" is the fact that the original contract, involving questions of confidence and judgment, was between Los Angeles parties. Now, in derogation of the language of the contract, parties from the other side of the continent seek to intrude themselves.

In other words, this is a contract involving personal skill, trust, and confidence.

The general rule has long been that contracts which involve personal skill, trust, or confidence are not assignable unless expressly made so by their terms.

> *Coykendall v. Jackson,* 17 Cal. App. 2d 729, 731, 62 P. 2d 746 (1936).

VI.

The Meaning of the Word "Nominee" Cannot Be Varied by Parol Evidence.

If the language of a written contract is clear and explicit and does not express an absurdity, it cannot be varied or explained by parol evidence but must speak for itself.

In *Wells Fargo Bank & Union Trust Co. v. McDuffee,* 71 F. 2d 720 (9th Cir., 1934), cert. den. 293 U. S. 626 (1935), this Court refused to permit parol evidence of an alleged agreement excluding foreign bills of lading from a written contract, saying (71 F. 2d 721):

> "Parol evidence can be introduced to identify the subject matter of the contract, but not to contradict its terms. *Gardiner v. McDonogh,* 147 Cal. 313, 81 P. 964. There may be a valid, oral collateral agreement, if it does not conflict with or alter the terms of the written agreement. *Whittier v. Home Savings Bank,* 161 Cal. 311, 317, 119 P. 92; *Dollar v. International Banking Co.,* 13 Cal. App. 331, 109 P. 499. But where the written agreement purports to be complete, terms cannot be added to it by parol. *Empire Inv. Co. v. Mort,* 169 Cal. 732, 147 P. 960."

Pacific States Corporation v. Hall, 166 F. 2d 668 (9th Cir., 1948), involved the interpretation of the words "until paid." The Court said (166 F. 2d 672):

> "The note for the original $45,000 indebtedness provided for the payment of the principal on or before five years after date 'with interest from date until paid.' . . . Appellees contend that 'until paid' should be read as 'until maturity.' With this we cannot agree. The intention of the parties must be gathered from the face of the contract and where, as here, there is an express provision requiring a certain rate of interest until the principal is paid, the contract must be so enforced."

California cases are to the same effect.

Ohio Electric Car Co. v. Le Sage, 182 Cal. 450, 455-456, 188 Pac. 982 (1920);

Dillon v. Sumner, 153 A. C. A. 707, 710 (1957);

El Zarape Tortilla Factory, Inc. v. Plant Food Corp., 90 Cal. App. 2d 336, 344, 203 P. 2d 13 (1949);

Cox v. Miller, 15 Cal. App. 2d 494, 497-498, 59 P. 2d 628 (1936);

Briggs v. Marcus-Lesoine, Inc., 3 Cal. App. 2d 207, 212, 39 P. 2d 442 (1934).

Ohio Electric Car Co. v. Le Sage, supra, involved the interpretation of a written guarantee attached to the contract. The Court said (182 Cal. 455-6):

> "The surrounding circumstances cannot be resorted to for the purpose of giving a different meaning to the terms of the guaranty. There is nothing ambiguous in these terms, nor were any facts alleged which create an intrinsic ambiguity, and in such cases extrinsic evidence to control or explain the meaning of the language is inadmissible."

In *Cox v. Miller, supra,* the Court said (15 Cal. App. 2d 498):

> "The trial court erred in admitting parol evidence to explain the unambiguous terms of a written contract (secs. 1638 and 1639 Civ. Code).
>
> " 'Where the terms of an agreement are set forth in writing and the words are not equivocal or ambiguous, the writing or writings will constitute the contract of the parties, and one party is not permitted to escape from its obligations by showing that he did not intend to do what his words bound him to do.' (*Brant v. California Dairies Inc.,* 4 Cal. 2d 128, 48 Pac. 2d 13.)"

Thus, parol evidence then cannot be introduced to vary the meaning of the language of the alleged written agreement which is definite and clear.

As the cases cited above demonstrate, the meaning of nominee is clear and unambiguous. Appellants in their brief cite no cases interpreting the word otherwise, or as having any special usage.

Appellants argue that, irrespective of the certainty of the meaning of "nominee," they should be permitted to introduce evidence to show trade usage as to the meaning of nominee (A. B. 13, 14). This argument was not raised in the court below, nor is it in "Appellants' Statement of Points Upon Which Appellants Intend to Rely. . . ." [R. 24-26.] Nor is there any allegation whatever of trade usage in either the original Complaint [R. 3-7] or the Amended Complaint [R. 8-13]. Appellants' contention would mean as a practical matter that no complaint sounding in contract could ever be subject to a motion to strike on the basis of the terms of the contract as alleged.

The Supreme Court long ago held in *Grace v. American Central Insurance Company,* 109 U. S. 278, 283, 3 S. Ct. 207, 27 L. Ed. 932 (1883):

> "An express written contract, embodying in clear and positive terms the intention of the parties, cannot be varied by evidence of usage or custom."

See also *Withers v. Moore,* 140 Cal. 591, 597, 74 P. 159 (1903).

In the very recent case of *Lattimore v. Merchants Fire Assurance Corporation,* 151 Fed. Supp. 396, 399 (N. D. Calif., 1957), the District Court in this Circuit held:

> "If a clear, positive and unambiguous contract is executed, then custom, usage or practice cannot be used to vary, enlarge or otherwise alter the terms."

In *Home Insurance Company v. Exchange Lemon Products Co.,* 126 Fed. Supp. 856, 859 (S. D. Calif., 1954), the District Court in this Circuit refused to permit evidence of trade usage to make an insurance policy cover goods in storage when the express words of the contract said the policy covered goods while being transported, "but not if such property is in storage." The court there stated the rule (126 Fed. Supp. 858, 859):

> "If, as alleged in the counterclaim, the agents of the parties knew of and discussed the transit privilege provisions of the applicable railway tariff and the likelihood of storage occurring, the insertion in the contract of the express provision that the policy does not cover 'if such property is in storage' is a clear indication that the parties intended to exclude the application of such usage from their contract. Under such circumstances the law is settled that evidence of trade usage is not admissible. The Cali-

fornia Supreme Court in *Ermolieff v. R. K. O. Radio Pictures, Inc., supra,* citing *New York Central R. Co. v. Frank H. Buck Co.*, 2 Cal. 2d 384, 41 P. 2d 547, states the rule: '* * * where the terms of the contract are expressly and directly contrary to the precise subject matter embraced in the custom or usage, parol evidence of that custom or usage is not admissible.' [19 Cal. 2d 153, 122 P. 2d 6.] Also see *Fish v. Correll,* 4 Cal. App. 521, 88 P. 489; *Withers v. Moore,* 140 Cal. 591, 74 P. 159; Wigmore on Evidence, 3rd Ed., Vol. IX, Sec. 2440, p. 127; Williston on Contracts, Sec. 656; Restatement, Contracts, Sec. 247, comment (d), p. 350. As stated by the United States Supreme Court, 'This rule is based upon the theory that the parties, if aware of any usage or custom relating to the subject-matter of their negotiations, have so expressed their intention as to take the contract out of the operation of any rules established by mere usage or custom.' *Grace v. American Central Ins. Co.,* 109 U. S. 278, 283, 3 S. Ct. 207, 210, 27 L. Ed. 932.

"The language of the contract is unambiguous and is fairly susceptible of but one interpretation. It is denominated a transportation policy and the parties intended it to cover the goods while being transported, 'but not if such property is in storage.' At the time of their destruction and for approximately a year prior thereto, the goods were in storage and, therefore, not covered by the policy."

The contract in the present case is clear and unambiguous. From the contract itself, and the subject matter of the contract, it is apparent that the word "nominee" was used deliberately in its restrictive character.

VII.

This Action Must Fail Because It Is Not Prosecuted in the Name of the Real Party in Interest.

The real party in interest in the present action is Harold L. Shaw, who is not a party to the litigation.

Rule 17(a) of the Federal Rules of Civil Procedure provides:

> "Every action shall be prosecuted in the name of the real party in interest; . . ."

Moore restates the rule (3 *Moore's* Federal Practice, Sec. 17.02, p. 1305):

> "The meaning and object of the real party in interest provision would be more accurately expressed if it read: *An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced.*"

The California statute (Code Civ. Proc., Sec. 367) is similar, and reads:

> "Every action must be prosecuted in the name of the real party in interest; . . ."

This rule has been interpreted in the case of *Young v. Garrett,* 149 F. 2d 223 (8th Cir., 1945). The Court in that case held that state law controls as to who are indispensable parties, and ruled that, since under Arkansas law tort claims were not assignable, the attempted assignor was a necessary party. See also note in 4 U. C. L. A., L. Rev. 619, 621-622 (June, 1957).

By substantive law, the right here sought to be enforced is in Harold L. Shaw, who is not even a party.

VIII.

Appellants Are Not Nominees.

Appellants nowhere allege that they are suing on behalf of Shaw, and it is plain from a reading of the Amended Complaint that they are suing in their own right. Further, Appellants nowhere allege that any of their actions have been done on behalf of Shaw. All acts alleged by Appellants are clearly stated as acts of Appellants in their own right. Appellants allege in Paragraph VII of their verified Amended Complaint that [R. 11]:

> ". . . at all times since the said 10th day of November, 1956, the Plaintiffs have been and are the owners and holders of all the right, title and interest of the said Harold L. Shaw in and to the agreement in writing hereinabove set forth."

This allegation is inconsistent with the status of a nominee, who merely acts for or stands in place of the true holder of all right, title, and interest, and is adverse to the rights in contract belonging to Shaw.

The paper, Exhibit B [R. 15], on which Appellants rely to acquire their rights, is also inconsistent with a designation of nominee. This paper obviously is an assignment. It recites a consideration in the very paragraph that purports to be a designation of a nominee. Consideration is not necessary, or usual, to a designation of nominee, but it is common in an assignment and always present in a sale. Finally, the second paragraph of Exhibit B assigns to Appellants "as my nominee' all right, title, and interest of Shaw, a contradiction in terms. It is thus apparent that the instrument, Exhibit B, under which Appellants claim is an assignment, and the use of "nominee" therein is inconsistent with the whole tenor of the paper and ineffective as a designation of nominee.

Further, the language of the letter, Exhibit C [R. 16-17], is that of one who acts as principal and owner in his own right. It states throughout what "we," the Appellants, are doing. "We" nowhere purports to act on behalf of Shaw.

Hence, it is apparent that Exhibit B is a purported assignment and that Appellants have so regarded it in fact and in the allegations of their Complaint.

IX.

It Is Apparent From the Complaint That Appellee Has Not Waived the Non-assignability of the Contract.

The original Complaint contained no allegations of any waiver by Appellee of its right to deal with Shaw or his nominee alone, or of any reliance by Appellants on a waiver [R. 3-7]. In their Amended Complaint, Appellants allege [Par. IX, R. 11]:

> "That, between the said 5th day of December, 1956, and the 8th day of January, 1957, the Defendant recognized, acknowledged and dealt with the Plaintiffs herein as the assignee of Harold L. Shaw, and in reliance thereon Plaintiffs herein changed their position to their detriment and damage as is hereinafter set forth."

The motion to dismiss for failure to state a claim upon which relief can be granted and for failure to join an indispensable party is made under Rule 12 of the Federal Rules of Civil Procedure. Such a motion performs the same function as the old common law general demurrer. It admits for the purpose of the motion only well-pleaded allegations of the complaint which are material and

relevant and not arguments, unwarranted inferences, and legal conclusions.

Flanigan v. Security-First National Bank, 41 Fed. Supp. 77, 79 (S. D. Cal., 1941);

2 *Moore's* Federal Practice (2nd Ed.), Sec. 12.08, p. 2244.

A motion to dismiss does not admit conclusions of law or inference or conclusions of fact not supported by allegations of specific facts upon which the inferences or conclusions rest.

Newport News Co. v. Schauffler, 303 U. S. 54, 57, 58 S. Ct. 466, 82 L. Ed. 646 (1938);

Pacific States Co. v. White, 296 U. S. 176, 184, 185, 56 S. Ct. 159, 80 L. Ed. 138 (1935);

Dunn v. Gazzola, 216 F. 2d 709 (1st Cir., 1954);

Sexton v. Barry, 233 F. 2d 220 (6th Cir., 1956).

Not only is the matter not well pleaded in this Amended Complaint, but the general allegations of the paragraph are contradicted by the specific factual allegations of the Complaint which show that Appellants had entered upon their course of action prior to December 5, 1956, and did not change it then or thereafter.

The Designation of Nominee and Assignment of Commitment of November 15, 1956 [Ex. B, R. 15], three weeks before the beginning of the alleged waiver, and the letter of December 20, 1956 [Ex. C, R. 16-17], two weeks after it, in almost identical language present Appellants' contradictory claims. Hence, there was quite obviously no change of position by Appellants between November 15, 1956 and December 20, 1956.

Both the Amended Complaint [Par. X, R. 11] and Exhibit C [R. 16-17] set December 20, 1956 as the date of Appellants' alleged tender. The letter of tender of December 20, 1956 is in the language of the paper of November 10, 1956, so the tender itself does not represent any change of position, but on the contrary represents a position taken by Appellants before any communication with Appellee.

Paragraph XII of the Amended Complaint [R. 12] alleges that Appellee refused to purchase such loans "and has, at all times since said 20th day of December, 1956, continued to fail and refuse to purchase" the loans. A flat refusal to buy on the date of tender is hardly a basis for estoppel or waiver. There had been no change of position before December 20, 1956, and on December 20, 1956, Appellee rejected Appellants in whatever capacity they were acting.

Finally, as previously argued, the alleged agreement [Ex. A, R. 13-14] ran only to Shaw or his nominee. The allegations of Paragraph IX are an attempt to evade the parol evidence rule and must fail also on the basis of the authorities heretofore cited.

In *Pacific States Corporation v. Hall,* 166 F. 2d 668 (9th Cir., 1948), claim was made that a creditor had waived his claim for interest by failing to include interest on statements issued. The Court said (166 F. 2d 671):

> "Appellees contend that consideration is not always a requisite for waiver, but it is generally held that where substantial rights are involved, a waiver must be supported by a consideration to be valid. 56 Am. Jur. Sec. 16, p. 117. At any rate, waiver consists of a voluntary and intentional relinquishment of a known right; and to prove a case of im-

plied waiver of a legal right, as appellees here attempt to do, there must be a clear, unequivocal and decisive act of the creditor showing a purpose to abandon or waive the legal right, or acts amounting to an estoppel on his part."

None of the foregoing are present in the allegations of the Amended Complaint.

Conclusion.

It is thus apparent that Appellants purported to act and to sue as assignees of a written agreement which is not assignable and hence have no rights in such agreement, that Appellants are not the real parties in interest, and the real party in interest has never acted under the contract or brought suit, and that there has been no waiver or estoppel.

It is respectfully submitted that the judgment dismissing the action should be sustained.

Respectfully submitted,

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By Paul Fitting,

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